Supreme Court, U.S.
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No. 96-651

In The

Supreme Court of the United States

October Term, 1996

JAMES E. GILBERT, *et al.*,

Petitioners,

vs.

RICHARD J. HOMAR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent requests that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Third Circuit. The Opinion and Order of the Court of Appeals are reported at 89 F.3d 1009 and have been reprinted in the appendix of the Petition at 1a *et seq.* The Opinion and Order of the District Court is not reported, but is reprinted in the Appendix at 47a *et seq.* (For the convenience of the Court, all citations to the Opinions will be to the Opinions attached to the Petition).

STATEMENT OF THE CASE

Respondent respectfully opposes the Petition for Writ of Certiorari which asks the Court to review the holding of the Court of Appeals for the Third Circuit which requires any suspension of a public employee, prior to notice and an opportunity to be heard, to be a suspension with pay. This holding is consistent with the Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Contrary to what is stated in the Petition, the above holding of the Court of Appeals for the Third Circuit is uncontroversal, may be simply applied, and does not impede public officials from acting expeditiously to protect the public and promote public safety.

This case concerns the suspension (and subsequent demotion) of Richard J. Homar ("Homar"), a police officer at East Stroudsburg University ("ESU"), a State University located in East Stroudsburg, Pennsylvania. Homar was arrested on August 22, 1992 during a drug raid which took place at the home of his friend, James Crompton. Pet. App. at 3a. As a result of the raid, Homar was charged with possession of marijuana, possession with intent to deliver and criminal conspiracy. *Id.*

Upon learning of Homar's arrest, ESU's Director of Human Resources, Gerald Levanowitz (hereinafter "Levanowitz"),

immediately made a decision to suspend Homar without pay. *Id.* No pre-suspension notice was given to Homar and a pre-suspension hearing was not held. *Id.* The day following his arrest, August 27, 1992, Homar received a letter from Levanowitz notifying Homar that he was suspended without pay. *Id.* The letter indicated that Homar was suspended pending further investigation and disposition of the criminal charges. *Id.*

On September 1, 1992, all criminal charges filed by the State Police against Homar were dismissed after a preliminary hearing. Notwithstanding, the suspension without pay imposed on Homar was not lifted and the University continued with its own investigation. Pet. App. at 4a.

On September 11, 1992, Levanowitz along with two ESU police officers who were assigned to conduct an investigation on Homar, met with two state troopers and a corporal to discuss Homar's case. The meeting took place at the Pennsylvania State barracks. At that meeting, Levanowitz was provided a copy of a page from the Pennsylvania State Police investigative file concerning Homar entitled "Supplemental Report". The report included statements allegedly made by Homar to the State Police in which Homar admitted knowledge of drug dealing by Crompton and another individual named Habhab. This "supplemental report" also contained alleged statements by Homar that he had accepted marijuana for his own use from Habhab while employed at ESU as a police officer. Homar denied ever making any such statements. *Id.*

On September 18, 1992, Homar attended what was referred to by Levanowitz as a "administrative hearing". *Id.* Levanowitz indicated to Homar that the purpose of the hearing was to give him an opportunity to provide any information that would assist him in making a determination concerning any actions that would end his suspension and any other information that would

help Homar in presenting his case. Pet. App. at 5a. Levanowitz advised Homar that "the State Police had given [him] evidence very serious in nature", but Levanowitz never disclosed to Homar what the evidence was, or that he had received the supplemental report containing the damaging statements allegedly made by Homar. *Id.* As such, Homar was not able to respond to the statements he allegedly made to the State Police.

On September 23, 1992, Levanowitz issued a letter to Homar demoting Homar from the position of Police Officer I, to Groundskeeper, said demotion being retroactive to August 26, 1992. Pet. App. at 5a-6a. The letter indicated that "[t]his action is being taken as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 . . ." *i.e.*, the statements contained in the Supplemental Report. Pet. App. at 6a.

Homar requested review of his demotion by the President of the University, James Gilbert, which was denied. Pet. App. at 6a. Homar commenced work as a groundskeeper and shortly thereafter received back pay from the date of his suspension, at a groundskeeper rate, which is less than that of a police officer. Pet. App. at 16a. On February 16, 1993, Levanowitz authorized Homar's back pay from his suspension to the date of his demotion at police officer rate. Pet. App. at 16a.

The District Court granted Defendant's Motion for Summary Judgment to which an appeal was filed by Homar. The Court of Appeals for the Third Circuit reversed the District Court's determination that Homar was properly suspended without pay.

REASONS FOR DENYING THE WRIT

I.

THE HOLDING OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT IS IN ACCORDANCE WITH *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*, 470 U.S. 532 (1985).

The Court of Appeals for the Third Circuit held that a governmental employee may not suspend an employee without pay unless the suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard. Pet. App. 14a. However, an employee may be suspended without notice and an opportunity to be heard if the suspension is with pay. *Id.*

In determining that any suspension without pay requires a pre-suspension hearing, the Court of Appeals for the Third Circuit relied upon the language in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Pet. App. at 11a. As the Court of Appeals for the Third Circuit noted, *Loudermill* clearly suggests where the employer perceives a significant hazard in keeping the employee on the job pending a pre-deprivation hearing, it is appropriate that the employee be suspended with pay. 470 U.S. 544-45. The Court stated:

> Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

470 U.S. 544-45 (footnote omitted).

It is conceded that the above language of *Loudermill* is *dicta*,

however, such *dicta* is in complete accord with and logically follows from the Court's analysis of of the competing interests of the government "in the expeditious removal of unsatisfactory employees", and the employee's interest in preserving "the means of livelihood". 470 U.S. 542-543. Simply stated, where a governmental employer believes it is necessary to immediately remove an employee prior to a notice and opportunity to be heard, it is appropriate to suspend the employee with pay. A suspension with pay satisfies the governmental interest in "expeditious removal", and the employee's interest in maintaining "the means of livelihood".

Contrary to what is set forth in the Petition, it is submitted that the *per se* Rule promulgated by the Third Circuit requiring any pre-deprivation suspensions to be with pay does not conflict with the Court's procedural due process jurisprudence.

Petitioner argues that the Court has repeatedly rejected the idea that due process "always requires the State to provide a hearing prior to the initial deprivation of property" and has engaged in a "particularized balancing of the private and governmental interests at stake" on a case by case basis. Pet. App. at 11. It is significant that the cases cited by Petitioner herein do not concern an employee's property interests in his or her employment. In *Loudermill*, the Court noted:

> . . . [T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.

470 U.S. at 543 (citations omitted).

It is submitted that a balancing test may be appropriate in non-employment cases where some other property right is being deprived. *Parrat v. Taylor*, 451 U.S. 527 (1981), overruled in part and other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). However, in an employment context, where one's means of livelihood is at stake, *Loudermill* strongly suggests that where immediate removal of the employee is required, suspension with pay is the appropriate means to effectuate said removal pending a post-deprivation hearing. The requirement that any suspension be with pay is well grounded in the Court's repeated recognition of the severity of depriving someone of his or her livelihood. *Loudermill*, 470 U.S. at 543; *FDIC v. Mallen*, 486 U.S. 230, 243.

II.

ON THE FACTS OF THIS CASE, A SUSPENSION WITH PAY WAS APPROPRIATE PENDING A PRE-DEPRIVATION HEARING.

Assuming arguendo that a *per se* rule against pre-hearing suspensions without pay is not appropriate in all cases, nevertheless, a suspension with pay was appropriate in this case.

Homar was immediately suspended without notice and an opportunity to be heard after Levanowitz learned of Homar's arrest. Pet. App. at 3a. The following day, Homar received a letter from Levanowitz advising him of his suspension pending further investigation and disposition of the criminal charges. The letter further advised Homar that any administrative action taken by the University against him "[did] not have to coincide with the disposition of those charges through the legal process". Pet. App. at 3a.

Clearly, Homar was being suspended for an indefinite, open-ended period of time. The letter to Homar advising him of his suspension specifically contemplated the suspension continuing beyond the date of the "disposition" of the criminal charges filed against Homar. The charges were dismissed after a preliminary hearing on September 1, 1992. Pet. App. at 4a. However, had the charges been bound over, it may have taken months, or possibly years, for the final disposition of the criminal case.

Under a traditional due process balancing test, it is appropriate to conclude that Homar's private interests in retaining his employment and "means of livelihood" mandated that he be provided either with a notice and opportunity to be heard prior to his suspension, or be suspended with pay during the indefinite period of suspension. As the Court noted in *Loudermill*, assuming a lengthy suspension, Homar would find it difficult to obtain employment elsewhere based upon the "questionable circumstances under which he left his previous job". 470 U.S. at 543 (citations omitted).

In cases where an independent fact finder has determined that the criminal charges are without probable cause, there is an even stronger private interest in a suspension without pay pending additional investigation. In *FDIC v. Mallen*, 486 U.S. 230 (1988), a bank president was suspended pending a post-deprivation hearing. In analyzing whether such suspension comported with due process, the Court attached significance to the determination of a grand jury that charges were supported by probable cause. 486 U.S. at 241. The Court stated:

> An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may, in limited cases, demand a prompt action justifying postponing the

> opportunity to be heard until after the initial deprivation.

486 U.S. at 240 (citations omitted).

In this case, Homar was not indicted by a grand jury, but rather was arrested by the Pennsylvania State Police. A preliminary hearing was held shortly thereafter, after which all charges against Homar were dismissed. Unlike in *Mallen*, the Homar suspension was, therefore, not ". . . supported by findings that assure that the suspension was not baseless". 486 U.S. at 241. To the contrary, an independent fact finder — the district justice at the preliminary hearing — heard the evidence and dismissed the case.[1]

Therefore, in this case, unlike *Mallen* and in other cases where the Court determined that it was appropriate to postpone the opportunity to be heard after the initial deprivation, there was no "substantial assurance that the deprivation [was] not baseless or unwarranted . . .". *Mallen* 486 U.S. at 240.

III.

THE THIRD CIRCUIT'S DECISION IS IN TRUE CONFLICT WITH ONLY ONE OTHER CIRCUIT.

The Petition suggests that the holding of the Third Circuit

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1. Under Pennsylvania Criminal Practice, a criminal defendant is entitled to a preliminary hearing after arrest at which the Commonwealth must demonstrate a *prima facie* case. Pa. Rule of Criminal Procedure, 141(d); 143(a). If a *prima facie* case is not established, the defendant must be discharged. *Id.* In order to establish a *prima facie* case, the Commonwealth must establish that a crime was committed and the accused is probably the individual who committed it. *Commonwealth v. Wojdak*, 502 Pa. 359, 466 A.2d 991 (1983).

is in conflict with decisions of five other Circuits. Pet. at 10. A close examination of the decisions cited in the Petition reveal that the decision is in true conflict with only one other Circuit Court decision.

The Third Circuit's decision is in conflict with *Bailey v. Board of County Commissioners of Alaachuka County*, 956 F.2d 1112 (11th Cir. 1992).

However, it is submitted that the Third Circuit's decision is not in conflict with the other circuit court cases cited at decisions cited in the Petition. Only one other case cited in the Petition squarely considers the language in *Loudermill* relied upon by the Third Circuit. In *Engdhal v. Department of Navy*, 900 F.2d 1572 (Fed. Cir. 1990), the Court found that Engdhal was afforded procedural due process prior to being suspended after criminal charges were filed against him relating to the sexual assault of his daughter. 900 F.2d at 1575. The court did not find that Engdhal was properly suspended without a pre-suspension hearing, but rather found that the procedural due process afforded Engdhal prior to his suspension was adequate. 900 F.2d at 1575-1576.[2]

None of the other decisions cited in the petition squarely consider the language in *Loudermill* relied upon by the Third Circuit.

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2. Engdhal was placed on administrative leave with pay pending a decision of whether to suspend him. During his administrative leave, he met with governmental officials to discuss potential adverse action based upon the government's concerns with respect to the criminal charges. After he received notice of his proposed suspension, he was provided an opportunity to personally and/or in writing submit a reply disputing the grounds for suspension. In addition to a written reply, he personally met with governmental officials and had legal representation via telephone during a telephone conference call which occurred at one of the meetings. 900 F.2d at 1576.

In *Jones v. City of Gary Indiana*, 57 F.3d 1435 (7th Cir. 1995), a fire fighter was suspended from his employment based upon a refusal of the fire fighter to return to work based on medical reasons. *Citing Matthews v. Eldridge*, 424 U.S. 319, 344 (1976), the Court found that because the relevant inquiry in the case was a medical one, and employee was subject to three independent medical board evaluations all which had found employee fit to return to duty, that suspension without a pre-suspension hearing was appropriate. 57 F.3d at 1435. The court opined where there had been numerous reviews of employee's medical history, all of which determined that employee could return to work, that ". . . there was no risk that [employee] was erroneously deprived of his protected interest in employment without a pre-suspension hearing . . .". 57 F.3d at 1443.

In *Ambus v. Granite Board of Education*, 975 F.2d 1555 (10th Cir. 1992), it is unclear whether the court determined that the suspended teacher had been afforded a notice and opportunity to be heard prior to his suspension, or that the suspension without pay was appropriate based upon the substantial government interest at stake. The court did specifically note that the school district notified the teacher before the suspension, and had formally provided him an opportunity to correct any erroneous information upon which his suspension was based. 975 F.2d at 1562.

Finally, in *Strong v. Board of Education of Uniondale, Union Free School District*, 902 F.2d 208 (2nd Cir. 1990), concerning the suspension of a teacher who refused to provide medical records to the school district after taking sick leave, the court determined that under New York law, a teacher who is not permitted to return from an extended voluntary sick leave because of a failure to supply medical records is not considered suspended or terminated. In any event, the court determined that the matter at issue was not a disciplinary matter, but rather a

mere request for medical records on the part of the district. 902 F.2d at 212.

Based upon the foregoing, there is no widespread conflict in the Circuits that would mandate the grant of the Petition.

IV.

THE THIRD CIRCUIT DECISION MAY BE EASILY APPLIED BY PUBLIC EMPLOYERS AT ALL LEVELS OF GOVERNMENT.

Where a public employer has a substantial interest in suspending an employee pending a post-deprivation hearing, the Third Circuit's decision does not prevent suspension, but merely requires the suspension to be with pay, or after a pre-suspension opportunity to be heard. The holding of the Third Circuit may be simply applied in all applicable instances.

The decision does not pose an undue hardship or burden upon a public employer who should, in any event, expeditiously investigate and finally determine allegations of wrong doing on the part of an employee. Should the employer wish to extend an investigation beyond the date of final disposition of criminal charges, as was the case in the within matter, then the private interest of the employee in maintaining his other means livelihood makes it appropriate that the employee continue to be paid during the period of such investigation, the conduct and time frame of which is solely in the discretion of the public employer.

CONCLUSION

For the above reasons, the Court should deny the Petition for Writ of Certiorari and allow to stand the holding of the Court of Appeals for the Third Circuit requiring a public employer to provide an employee with the notice and opportunity to be heard prior to any pre-deprivation suspension or, in the alternative, require the public employer to suspend such employee during the period of any investigation with pay.

Respectfully submitted,

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